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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

SEASPAN, INC., Plaintiff and Appellant, v. CHARLES W. GIACOMINI et al., Defendants and Respondents.	B151995, B154476 (Los Angeles County Super. Ct. No. BC235509)

APPEAL from orders and judgments of the Superior Court of Los Angeles County. James C. Chalfant, Judge. Affirmed.

Law Offices of Federico C. Sayre, Federico C. Sayre, and Daniel H. Cargnelutti for Plaintiff and Appellant.

Breidenbach, Huchting & Hamblet, Gary A. Hamblet, and Josephine M. Chow for Defendants and Respondents Charles W. Giacomini, H. Joel Biggs, and Hotel Managers Group.

Yoka & Smith and David T. McCann for Defendant and Respondent Purushottam Patel.

Rutan & Tucker, John B. Hurlbut, Jr., Steven J. Goon, and Robert H. Marcereau for Defendants and Respondents Ken Steelman, Mark Monachino, and Corbett & Steelman.

Loeb & Loeb, Robert A. Meyer, Daniel J. Friedman, and Negin Mirmirani for Defendants and Respondents Jeffer, Mangels, Butler & Marmaro, Paul Hamilton, Neil Erickson, and David Conn.

Manning & Marder, Kass, Ellrod, Ramirez, Michael McCarthy, David J. Wilson, and Robert C. Jenkins for Defendants and Respondents Bharat Patel, Ashik Patel, and PBA.

INTRODUCTION

This appeal arises out of an underlying lawsuit, the result of a dispute between two entities which purchased and operated a hotel. The trial court resolved this malicious prosecution action by granting two special motions to strike pursuant to the anti-SLAPP[1] statute, Code of Civil Procedure section 425.16,[2] and three motions for summary judgment, and entered judgment for the respondents. Appellant Seaspan, Inc. (Seaspan), challenges those rulings and seeks reinstatement of its lawsuit.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 1995, the Carson Hilton Hotel was purchased by three limited liability corporations: (1) PBA, LLC (PBA), consisting of Ashik and Bharat Patel (the Patels); (2) KRAD Associates, LLC, consisting of Kris and Ramesh Shah; and (3) KPOD, Ltd., whose members consist primarily of Sailor J. Kennedy (Kennedy) and Kennedy's immediate family, including his daughter, Irenemarie Kennedy (Irenemarie). Each entity

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1 SLAPP is an acronym for strategic lawsuit against public participation. (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 813, overruled in part on other grounds in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5.)

2 All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

owned a one-third interest in the hotel as tenants in common. Purushottam Patel (Purushottam), the Patels' father, was an individual guarantor of the loan used to purchase the hotel.

Seaspan was formed to manage the hotel. Ashik Patel and Irenemarie each owned 50 percent of Seaspan's stock. Irenemarie was its president and one of its two directors, and Ashik Patel was the vice president and other director. Kennedy served as an advisor to Seaspan.

The Partition Action

Conflicts arose in 1996 between the owners of the hotel, and on February 24, 1997, PBA, through the law firm of Corbett & Steelman, filed a complaint for partition against KRAD, KPOD, and the mortgage lenders on the property. On April 11, 1997, PBA obtained a court order appointing H. Joel Biggs (Biggs), the president and chief executive officer of Hotel Managers Group (HMG), as receiver. As the court-appointed receiver, Biggs removed Seaspan as manager of the hotel and replaced it with HMG.

The Cross-Complaints

Multiple cross-complaints ensued. KPOD cross-complained against PBA and the Patels. In response, PBA, the Patels, and Purushottam (collectively, the Patel Group), through the law firm of Jeffer, Mangels, Butler & Marmaro (JMBM), filed a cross-complaint against KPOD, Kennedy, and Seaspan (the PBA cross-complaint). They alleged that Seaspan, controlled by Kennedy and operating through Irenemarie, had improperly wrested operational control of the hotel from the other owners, operated the hotel for the benefit of Kennedy at the expense of PBA, failed to share financial information concerning the operation and maintenance of the hotel, and converted and misappropriated hotel funds for the benefit of Kennedy and the entities and persons he controlled.

Judge Domenichini's Decision in the Partition Action

On November 6, 1997, PBA obtained an order in the partition action for the partition of the hotel property. After Biggs filed his accounting, the parties stipulated to

an accounting trial before retired Judge Frank Domenichini. After eight days of evidence and testimony, Judge Domenichini issued his first and final statement of decision and report, finding: (1) Seaspan, consisting of Ashik Patel and Irenemarie, was formed to manage the hotel; (2) Kennedy was an "advisor" to Seaspan at all relevant times; (3) in 1995, Kennedy caused checks to be written between Seaspan and M&B Partners, a partnership consisting of Kennedy and Patrick Millican (Millican), to create the impression that $900,000 had been paid outside of escrow when in fact it had not; (4) from July 1996 to April 1997, Kennedy assumed control and operated the hotel; (5) Kennedy diverted monies to himself and affiliated entities and individuals (those funds were accounted for and charged against Kennedy and/or his related entities); and (6) Kennedy, Irenemarie, Millican, and certain entities controlled by Kennedy constituted a single enterprise throughout the acquisition, operation and sale of the hotel. Judge Domenichini's findings were adopted by the trial court in the partition action on May 13, 1999.

The Trial on the Cross-Complaints

The trial on the PBA and KPOD cross-complaints occurred in August and September 1999. The claims involving Seaspan were bifurcated from the remaining action, to be tried at a later date. However, the trial court ultimately determined that those issues would not be relitigated, noting that Judge Domenichini's decision "resolved or would have the effect of resolving all claims asserted against Seaspan in the PBA cross-complaint." Accordingly, on September 16, 1999, all claims against Seaspan were voluntarily dismissed by the PBA Group.

The Instant Lawsuit

Following the dismissal of the PBA cross-complaint, Seaspan filed the instant lawsuit for malicious prosecution and related causes of action against all those involved in the underlying action. After various demurrers and motions, the trial court ordered Seaspan to file a third amended complaint, the operative pleading. The third amended complaint names 16 defendants, grouped as follows: (1) the plaintiffs in the PBA cross-

complaint (the PBA Group); (2) the attorneys who filed the PBA cross-complaint (JMBM and three of its attorneys, collectively, the JM Defendants); (3) the attorneys who filed the partition action (Corbett & Steelman and two of its attorneys, collectively, the Steelman Defendants); and (4) Charles W. Giacomoni, one of the two HMG members, Biggs, and HMG (collectively, the HMG Defendants). The complaint alleges malicious prosecution against the PBA Group, the JM Defendants, and the Steelman Defendants, as well as derivative claims of alter ego against the HMG Defendants, PBA, and the Patels, and conspiracy against the HMG Defendants.

The Anti-SLAPP Motions and Corollary Motions for Attorney Fees

On April 9, 2001, the JM Defendants filed their demurrer and special motion to strike pursuant to section 425.16, arguing that malicious prosecution actions were subject to the anti-SLAPP statute and that Seaspan could not prove that the JM Defendants filed the PBA cross-complaint without probable cause. On May 22, 2001, the trial court granted that motion, finding that the instant malicious prosecution action was subject to section 425.16 and that Seaspan had not met its burden by demonstrating through competent and admissible evidence that it would prevail on its malicious prosecution claim. Seaspan "was required to present affirmative evidence that the [PBA] cross-complaint was completely without merit," and it failed to do so. Moreover, although not required to do so, the trial court affirmatively found that probable cause existed for the filing of the PBA cross-complaint. Specifically, it acknowledged Judge Domenichini's findings that "Kennedy controlled the operation of the [hotel], a task for which . . . Seaspan was formed. [Judge Domenichini] further found that Mr. Kennedy had a unity of interest with Irenemarie Kennedy, a principal director of Seaspan, and misappropriated revenue from the hotel on various occasions, using [Seaspan] to do so. [¶] Whether these findings are true is beside the point. They serve only to show that a reasonable attorney could find a legally tenable basis for [the JM] Defendants filing and litigating the [PBA] cross-complaint against Seaspan in the underlying action."

On May 9, 2001, the PBA Group similarly filed a motion to strike pursuant to the anti-SLAPP statute, reiterating the arguments made by the JM Defendants, as well as asserting that (1) Seaspan could not establish that the PBA cross-complaint terminated in its favor, (2) the absolute litigation privilege applied, (3) the statute of limitations barred Seaspan's claims, and (4) collateral estoppel. On June 25, 2001, the trial court likewise granted that motion, finding that "a malicious prosecution claim falls generally within the scope of section 425.16." Moreover, Seaspan did not demonstrate through competent and admissible evidence that the PBA Group lacked probable cause in pursuing the PBA cross-complaint.

The JM Defendants and the PBA Group then brought motions for attorney fees, pursuant to section 425.16, subdivision (c). Those motions were granted.[3]

Seaspan timely appealed from the orders granting the anti-SLAPP motions as well as the orders awarding the moving parties their attorney fees.

The Motions for Summary Judgment

On July 24, 2001, the Steelman Defendants filed a motion for summary judgment, claiming that they did not initiate the cross-complaint and, even if they did, there was sufficient probable cause to bring the action in light of Judge Domenichini's findings. On July 25, 2001, and July 30, 2001, respectively, Giacomini and Biggs/HMG also filed motions for summary judgment, based in large part upon the trial court's prior determination of probable cause in connection with the anti-SLAPP motions.

On August 22, 2001, the trial court granted all three of the summary judgment motions for procedural and substantive reasons. Seaspan's opposition was procedurally defective because Seaspan neglected to provide a separate statement, as required by section 437c, subdivision (b). Substantively, the HMG Defendants were entitled to summary judgment because Seaspan's alter ego and conspiracy theories stood or fell with its malicious prosecution claim, and the moving parties had shown probable cause based

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[3] Seaspan did not oppose the PBA Group's motion.

upon Judge Domenichini's findings. Judgment was entered for the Steelman Defendants on September 12, 2001. Judgment was entered for Giacomini and Biggs/HMG on September 10, 2001, and October 5, 2001, respectively.

Seaspan timely filed its notices of appeal from those judgments on November 16, 2001, and November 28, 2001, respectively.

DISCUSSION

The Anti-SLAPP Motions

I. *Standards of Review*

"We review the trial court's rulings on a SLAPP motion independently under a de novo standard of review. [Citation.]" (*Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 929.) We review the trial court's order awarding attorney fees to the prevailing parties for abuse of discretion. (*Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1426.)

II. *The Trial Court Properly Granted the Anti-SLAPP Motions*

Section 425.16, subdivision (b)(1) provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right to petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." The statute "posits . . . a two-step process for determining whether an action is a SLAPP." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) First, the defendant bringing the special motion to strike must make a prima facie showing that the anti-SLAPP statute applies to the claims that are the subject of the motion. (*Wilcox v. Superior Court*, *supra*, 27 Cal.App.4th at p. 819.) Once a moving defendant has met its burden, the motion will be granted (and the claims stricken) "unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).) To do so, the plaintiff must *substantiate* each element of its alleged causes of action through competent, admissible evidence. (*DuPont Merck*

Pharmaceutical Co. v. Superior Court (2000) 78 Cal.App.4th 562, 568; see also *Navellier v. Sletten*, *supra*, at pp. 88-89 [reiterating that "'the plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited"'"].) If the plaintiff fails to meet this burden, the motion will be granted. (*Mattel, Inc. v. Luce, Forward, Hamilton & Scripps* (2002) 99 Cal.App.4th 1179, 1188-1189.)

Since the parties' briefs were filed, the Supreme Court has held that malicious prosecution actions are subject to the anti-SLAPP statute. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728.) Thus, the burden shifted to Seaspan to show, through competent, admissible evidence, a probability of success on the merits of its claim for malicious prosecution in order to defeat the anti-SLAPP motions. (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821; *Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1496-1498.) Accordingly, Seaspan was required to establish that the PBA cross-complaint (1) was commenced by or at the direction of the defendants, (2) pursued to a termination in the plaintiff's favor, (3) brought without probable cause, and (4) initiated with malice. (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 871-872.) As set forth below, Seaspan failed to provide competent evidence to substantiate the elements of (1) the absence of probable cause, (2) malice, and (3) termination of the PBA cross-complaint in its favor.[4]

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[4] Seaspan's other causes of action (alter ego and conspiracy) are not causes of action; they are legal doctrines, derivative of the malicious prosecution claim and rise and fall with that cause of action. (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510-511, 513; *Hennessey's Tavern, Inc. v. American Air Filter Co.* (1988) 204 Cal.App.3d 1351, 1358-1359.) Because the malicious prosecution claim fails as a matter of law, so too do these dependent theories of liability.

A. Probable Cause

The issue of whether probable cause exists is a question of law. (*Sheldon Appel Co. v. Albert & Oliker*, *supra*, 47 Cal.3d at p. 884.) The PBA cross-complaint lacked probable cause only if all reasonable lawyers would agree that it totally and completely lacked merit. (*Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375, 382.) This determination depends upon the facts known to the party at the time of the filing of the action and the reasonable inferences therefrom. (*Sheldon Appel Co. v. Albert & Oliker*, *supra*, at p. 884; *Morrison v. Rudolph* (2002) 103 Cal.App.4th 506, 512.)

Here, Seaspan failed to present evidence to the trial court demonstrating that "all" reasonable lawyers would have found that the PBA cross-complaint lacked merit. In opposition to the JM Defendants' special motion to strike, Seaspan relied upon statements from its attorneys (Millican and Robert Dickson) and a host of exhibits attached to a notice of lodgment and request for judicial notice filed with the trial court. This purported evidence is insufficient. As the trial court correctly found, counsels' arguments and opinions are not admissible evidence. (*Morrison v. Rudolph*, *supra*, 103 Cal.App.4th at p. 514; BAJI No. 1.02 (9th ed. 2002); 7 Witkin, Cal. Procedure (4th ed. 1997) Trial, § 308, pp. 354-355.) And, Seaspan's generic reference to the numerous exhibits submitted with its opposition is inadequate to defeat the anti-SLAPP motion. (*Carmen v. San Francisco Unified School District* (9th Cir. 2001) 237 F.3d 1026, 1031.)

Notably, in its opening brief, Seaspan still does not identify any evidence that the PBA cross-complaint was initiated without probable cause. Instead, it simply challenges the trial court's alleged exclusive reliance upon Judge Domenichini's order to support its finding that Seaspan could not demonstrate a probability that it would prevail on its malicious prosecution claim. Seaspan is wrong. The trial court did not rely upon Judge Domenichini's order in concluding that Seaspan had failed to demonstrate the absence of

probable cause. Rather, as discussed below, it properly relied upon his findings as evidence of the presence of probable cause to pursue the PBA cross-complaint.[5]

Apparently recognizing the evidentiary problems with its opposition to the anti-SLAPP motions, Seaspan now requests judicial notice of the reporter's transcript of the proceedings in the partition action as well as certain deposition excerpts in its opening brief. We deferred ruling on this request until the matter was submitted, and we now deny Seaspan's request for judicial notice. The trial and deposition transcripts of which Seaspan seeks judicial notice are not judicially noticeable. (Evid. Code, § 452; *Williams v. Wraxall* (1995) 33 Cal.App.4th 120, 130, fn. 7 [reiterating the well-established rule that the court cannot take judicial notice of the truth of hearsay statements in decisions or court files, including affidavits and testimony].) Moreover, we decline to consider this evidence which has been available since 1998, but which was not placed before the trial court for no apparent reason. (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3.) In any event, this evidence does not negate the existence of probable cause, as set forth below. (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 167-168.)

Even though it was not required to do so, with respect to the element of probable cause, the trial court did more than simply find that Seaspan failed to provide evidence demonstrating that the PBA cross-complaint was pursued without probable cause; it affirmatively found that probable cause existed for its initiation and prosecution. In doing so, the trial court relied, in large part, upon the findings by Judge Domenichini. On appeal, Seaspan argues that Judge Domenichini's findings do not establish probable cause as a matter of law because (1) his findings do not mention Seaspan, who was not

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5 In its reply brief, for the first time on appeal, Seaspan purports to direct us to evidence of the lack of probable cause. Arguments first raised in a reply brief are not considered on appeal. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764; see also *Greenlining Institute v. Public Utilities Com.* (2002) 103 Cal.App.4th 1324, 1329, fn. 5; *ML Direct, Inc. v. TIG Specialty Ins. Co.* (2000) 79 Cal.App.4th 137, 146.)

present during the proceedings before Judge Domenichini, (2) his findings did not exist at the time the PBA cross-complaint was filed, and (3) the trial court improperly relegated its duty to determine probable cause to Judge Domenichini. Seaspan's arguments miss the point. Judge Domenichini's findings did not establish probable cause for pursuing the PBA cross-complaint. Rather, they merely confirm that there was probable cause for filing it in the first place.

With respect to the specific arguments raised by Seaspan, we reject each in turn. First, the fact that Judge Domenichini's order does not make express findings against Seaspan is irrelevant. The PBA cross-complaint alleged that "the Kennedy Group" (consisting of Kennedy and those persons and entities he controlled, including Irenemarie) "assumed control over the revenues, expenses, management, operations, assets and liabilities of the Carson Hilton" and thereafter diverted monies from the hotel to himself. Judge Domenichini's findings confirm that the moving parties had "information reasonably warranting an inference" that evidence existed to support such allegations. (*Morrison v. Rudolph*, *supra*, 103 Cal.App.4th at p. 512.) Judge Domenichini found that Kennedy and his affiliates, including Irenemarie, a 50 percent owner and president of Seaspan, constituted a single enterprise throughout the acquisition, operation, and sale of the hotel, that Kennedy was the controlling force behind this enterprise, that Kennedy assumed control of the hotel, and that Kennedy diverted monies from the hotel through Seaspan. It logically follows that Kennedy also assumed control of Seaspan. These findings establish that there was probable cause to file and pursue the PBA cross-complaint, regardless of whether the PBA Group ultimately proved its allegations against Seaspan.

Second, the fact that Judge Domenichini's order did not exist until a year and a half after the PBA cross-complaint was filed is irrelevant. "[S]ubsequent events in . . . litigation [can] demonstrate, as a matter of law, that the prior action was *objectively* tenable." (*Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 498.) Judge

Domenichini's order did just that. It confirmed that probable cause existed for the filing and pursuit of the PBA cross-complaint.

In its reply brief, Seaspan claims that any "inference" of probable cause is negated by the ultimate findings by the trial court against the PBA Group (and its attorneys). Again, Seaspan is confused. Simply negating the truth of the allegations in the PBA cross-complaint does not equate with the absence of probable cause. The parties prosecuting the PBA cross-complaint were not required to prevail in order to establish that they initiated and pursued the PBA cross-complaint with probable cause. (*Wilson v. Parker, Covert & Chidester, supra,* 28 Cal.4th at p. 818.)

B. Malice

Proof of the element of malice requires a plaintiff to show that the proceeding was commenced primarily for an improper purpose and that his or her interests were the target of the defendant's improper purpose. (*Camarena v. Sequoia Ins. Co.* (1987) 190 Cal.App.3d 1089, 1097; see also *George F. Hillenbrand, Inc. v. Insurance Co. of North America* (2002) 104 Cal.App.4th 784, 814.) Malice may be inferred where a party knowingly brings an action without probable cause. (*Swat-Fame, Inc. v. Goldstein* (2002) 101 Cal.App.4th 613, 634.) Here, Seaspan failed to present any evidence of malice to defeat the anti-SLAPP motions. On this independent ground, we could affirm the trial court's order.

Likewise, on appeal, Seaspan ignores this element. In its opening brief, Seaspan asserts that because it alleged that the PBA cross-complaint was filed with malice, that this element was not disputed by any of the respondents, and because the trial court did not mention this element when it granted the anti-SLAPP motions (and motions for summary judgment), "there is no issue on appeal with respect to the cross-complaint against Seaspan being initiated with malice." We are not persuaded by this argument. Simply alleging malice was insufficient for purposes of the anti-SLAPP motions. Rather, as set forth above, Seaspan was required to establish each element of the malicious

prosecution cause of action, including malice, through competent, admissible evidence. Having failed to do so, it did not meet its burden to defeat the special motions to strike.

In its reply brief,[6] Seaspan asserts that the declaration of Millican offered in opposition to the anti-SLAPP motions provides evidence of malice. We disagree. Seaspan's counsel's opinion is not evidence of malice. While he may have informed opposing counsel of his opinion that the PBA cross-complaint lacked merit, his opinion does not constitute evidence of malice. And, we cannot infer malice because, as set forth above, there is ample evidence that the PBA cross-complaint was brought with probable cause.

Similarly, the voluntary dismissal of the PBA cross-complaint is not evidence of malice. As discussed in section II.C., *infra*, the PBA cross-complaint was dismissed because it was moot. There is no evidence that it was dismissed for substantive reasons or because the PBA Group (and its counsel) believed that it lacked merit.

Seaspan requests judicial notice of Purushottam's deposition transcript and asserts that his testimony is evidence of malice. As set forth above, we deny Seaspan's request for judicial notice, and thus do not consider his testimony.

The fact that the trial court's orders fail to mention this element is irrelevant. We review a trial court's order granting an anti-SLAPP motion de novo. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999.) Thus, the trial court's omission has no bearing on our analysis and conclusion.

Because Seaspan failed to establish the element of malice through competent, admissible evidence, it did not meet its burden to show a probability of success on the merits of its claim for malicious prosecution. For this reason alone, we could affirm the trial court's order granting the anti-SLAPP motions.

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6 We reiterate that we will not consider evidence and argument presented for the first time in a reply brief. (*Reichardt v. Hoffman*, *supra*, 52 Cal.App.4th at p. 764.)

C. Terminated in Seaspan's Favor

In order to defeat the anti-SLAPP motion, Seaspan was required to demonstrate that the PBA cross-complaint was terminated in its favor. "The necessary focus on this element is whether the plaintiff has prevailed on the merits of the underlying claim: 'It is not essential to maintenance of an action for malicious prosecution that the prior proceeding was favorably terminated following trial on the merits. However, termination must *reflect* on the merits of the underlying action. [Citation.]' [Citation.]" (*Mattel, Inc. v. Luce, Forward, Hamilton & Scripps*, *supra*, 99 Cal.App.4th at p. 1190; see also *Villa v. Cole* (1992) 4 Cal.App.4th 1327, 1335.) "'A voluntary dismissal may be an implicit concession that the dismissing party cannot maintain the action and may constitute a decision on the merits. [Citations.] "It is not enough, however, merely to show that the proceeding was dismissed." [Citation.] The reasons for the dismissal of the action must be examined to determine whether the termination reflected on the merits.' [Citations.] A voluntary dismissal on technical grounds, such as lack of jurisdiction, laches, the statute of limitations or prematurity, does not constitute a favorable termination because it does not reflect on the substantive merits of the underlying claim. [Citations.]" (*Robbins v. Blecher* (1997) 52 Cal.App.4th 886, 893-894.)

Here, Seaspan has failed to demonstrate that the PBA cross-complaint was terminated in its favor. The PBA cross-complaint was dismissed because it was moot. As recognized by the trial court, there was no need to try the allegations of the PBA cross-complaint because Judge Domenichini's decision "resolved or would have the effect of resolving all claims asserted against Seaspan." There is no evidence that the PBA cross-complaint was dismissed because it lacked merit.

In its opening brief, Seaspan urges that the voluntary dismissal of the PBA cross-complaint constitutes a favorable termination because the trial court so found when it overruled the demurrers of the JM Defendants and the PBA Group. Again, because we review the trial court's ruling on the anti-SLAPP motions de novo, we are not bound by

the trial court's findings. (*ComputerXpress, Inc. v. Jackson*, *supra*, 93 Cal.App.4th at p. 999.)

In its reply brief, Seaspan asserts that we cannot consider this issue because the respondents did not file a cross-appeal challenging the trial court's order overruling the demurrers to Seaspan's complaint on the grounds that a voluntary dismissal is a termination in favor of Seaspan. Seaspan misunderstands the difference between appealing from an appealable order and appealing the reasons underlying a trial court's interlocutory order. The respondents were not required to file a cross-appeal challenging the basis of the trial court's ruling on the demurrers. They only were required to file a protective cross-appeal if they intended to challenge the trial court's order overruling the demurrers. Moreover, the trial court was free to change its mind regarding the element of favorable termination. (*Community Memorial Hospital v. County of Ventura* (1996) 50 Cal.App.4th 199, 205 ["[A] motion for summary judgment or adjudication is not a reconsideration of a motion overruling a demurrer. They are two different motions. To hold that a trial court is prevented in a motion for summary judgment or adjudication from revisiting issues of law raised on demurrer is to condemn the parties to trial even where the trial court's decision on demurrer was patently wrong."].)

D. The Respondents' Other Arguments

Because we conclude that the trial court properly granted the anti-SLAPP motions on the grounds that Seaspan did not provide evidence to support the elements of its malicious prosecution claim, we do not reach the merits of the respondents' remaining arguments, including statute of limitations and collateral estoppel.

III. *The Trial Court Did Not Abuse Its Discretion in Granting the Motions for Attorney Fees and Costs*

The JM Defendants and the PBA Group were awarded attorney fees and costs in connection with prevailing on their anti-SLAPP motions. Although Seaspan appeals from those orders, it failed to address the validity of the trial court's orders in its opening

brief, thereby waiving this argument on appeal. "'The reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment. It is entitled to the assistance of counsel. Accordingly every brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration.' [Citation .] [¶] It is the duty of [appellant], not of the courts, 'by argument and the citation of authorities to show that the claimed error exists.' [Citation.]" (*Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1050.) Since the issue of attorney fees as raised in Seaspan's opening brief was not properly presented or sufficiently developed to be cognizable, we decline to consider it and treat it as waived. (*People v. Stanley* (1995) 10 Cal.4th 764, 793; *People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19; *In re David L.* (1991) 234 Cal.App.3d 1655, 1661.)

Moreover, pursuant to section 425.16, subdivision (c), these respondents are awarded reasonable attorney fees and costs incurred in connection with this appeal. (*Evans v. Unkow*, *supra*, 38 Cal.App.4th at pp. 1499-1500.)

The Motions for Summary Judgment

I. *Standard of Review*

"A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review the trial court's decision de novo." (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476; see also *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) If, in deciding this appeal, we find there is no issue of material fact, we affirm the summary judgment if it is correct on any legal ground applicable to this case, whether that ground was the legal theory adopted by the trial court or not, and whether it was raised by defendant in the trial court or first addressed on appeal. (*Western Mutual Ins. Co. v. Yamamoto* (1994) 29 Cal.App.4th 1474, 1481.)

II. *The Trial Court Properly Granted the Motions for Summary Judgment*

For procedural reasons alone, the trial court properly granted the motions for summary judgment. Section 437c, subdivision (b), provides, in relevant part, that an opposition to a motion for summary judgment "shall include a separate statement which responds to each of the material facts" set forth in the moving party's separate statement. "Failure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court's discretion, for granting the motion." (*Ibid*.; see *Frazee v. Seeley* (2002) 95 Cal.App.4th 627, 636.)

In response to the summary judgment motions, Seaspan failed to include a separate statement of disputed and undisputed facts as mandated by section 437c, subdivision (b). On this independent ground, the trial court properly granted the motions for summary judgment.[7] Our analysis could stop here.

Nevertheless, for the sake of completeness, we affirm the trial court's order on substantive grounds as well. For the reasons set forth above, the HMG Defendants and the Steelman Defendants were entitled to summary resolution of the malicious prosecution cause of action because probable cause existed for the filing of the PBA cross-complaint. It follows that the derivative alter ego and conspiracy claims fail as well, entitling these moving parties to summary judgment as a matter of law. (*Applied Equipment Corp. v. Litton Saudi Arabia, Ltd.*, *supra*, 7 Cal.4th at pp. 511, 513; *Hennessey's Tavern, Inc. v. American Air Filter Co.*, *supra*, 204 Cal.App.3d at pp. 1358-1359.)

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[7] Notably, Seaspan does not challenge this basis of the trial court's order in its opening brief, thereby waiving this argument on appeal. (*Sprague v. Equifax, Inc.*, *supra*, 166 Cal.App.3d at p. 1050.) And, to the extent Seaspan argues in its reply brief that the trial court did not grant the motions for summary judgment for procedural deficiencies, we disagree. The trial court's order indicates that Seaspan's "failure [to submit a separate statement] alone constitutes sufficient ground for the court to grant the motions." Thus, the trial court ruled on both procedural and substantive grounds. And, we applaud the trial court's efforts to resolve all issues raised in the motions for summary judgment.

In their respondents' brief, the Steelman Defendants assert that Seaspan cannot prevail on its malicious prosecution claim against them because they did not prosecute the PBA cross-complaint. Seaspan refutes this claim and, in its reply brief, urges that we take evidence and make a factual determination that the Steelman Defendants did in fact prosecute the PBA cross-complaint, pursuant to section 909. In light of our holding that the trial court properly granted the motions for summary judgment on the grounds that (1) Seaspan failed to submit a separate statement, and (2) probable cause existed for filing and pursuing the PBA cross-complaint, we express no opinion as to whether the Steelman Defendants prosecuted the PBA cross-complaint. Thus, we deny Seaspan's request that we take evidence as moot.

DISPOSITION

The orders and judgments of the trial court are affirmed. The JM Defendants and the PBA Group are awarded reasonable attorney fees incurred in connection with this appeal. All respondents are awarded costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
NOTT